Filed 1/29/10 In re A.W. CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re A.L.W., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.L.W., Defendant and Appellant.	F057613 (Super. Ct. No. JV6583) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Tuolumne County. Eric L. DuTemple, Judge.

Carol L. Foster, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Catherine Chatman and Angelo S. Edralin, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION AND FACTS

In January 2009, appellant A.L.W. admitted an allegation contained in a juvenile Welfare and Institutions Code section 602[1] petition that he committed felony theft (the prior petition). An allegation that he resisted arrest was dismissed with a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754). In February, he was granted deferred entry of judgment and placed on probation.

On March 2, probation filed notice for a juvenile delinquency proceeding, alleging appellant committed an assault with a deadly weapon and vandalism.

On March 3, a section 602 petition was filed alleging that appellant committed an assault with a deadly weapon, battery with serious bodily injury and vandalism; a great bodily injury enhancement was alleged in connection with the assault allegation (the current petition).[2] The box notifying appellant that "[p]etitioner intends to move for an increase of the maximum term of confinement by aggregating the terms of all previously sustained petitions known to petitioner at the time of disposition" (intent to aggregate) was not marked.

On that same date, notice was filed stating that appellant was now ineligible for a deferred entry of judgment disposition.

A detention report was prepared. It referenced appellant's prior record and the deferred entry of judgment disposition on the prior petition.

After a contested jurisdictional hearing, the court found all of the allegations in the current petition to be true.

---

1 Unless otherwise specified all dates refer to 2009 and all statutory references are to the Welfare and Institutions Code.

2 Resolution of the issues presented on appeal does not require recitation of the factual circumstances of appellant's crimes.

A supplemental detention report was prepared. It set forth the maximum confinement time for each offense in the prior and current petitions. The maximum confinement time was determined to be eight years four months.

The dispositional hearing was held in April. In relevant part, appellant was ordered to serve 150 days in juvenile hall and 60 days on the electronic monitoring program. The maximum period of confinement was determined to be eight years four months. He was awarded 46 days predisposition credits.

Appellant challenges the maximum period of confinement on the ground that he did not receive notice of intent to aggregate in the current petition. Having examined all the facts, we find the omission harmless beyond a reasonable doubt. Appellant also argues that he is entitled to an additional 79 days presentence credit to reflect time spent in custody on the prior petition. Respondent concedes this point and we accept the concession as properly made.

DISCUSSION

I. Failure to provide notice of intent to aggregate in the current petition was harmless beyond a reasonable doubt.

Appellant contends the court violated his due process right by failing to provide notice of intent to aggregate in the current petition. Assuming without deciding that the point was not forfeited by the absence of contemporaneous objection, we find the omission harmless beyond a reasonable doubt.[3]

---

[3] Absence of notice of intent to aggregate in the current petition did not result in an unauthorized sentence. "Although the cases are varied, a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) While "legal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement. [] It does not follow, however, that nonwaiveable error is involved whenever a prison sentence is challenged on appeal. [Citation.]" (*Ibid*., fn. omitted.) In this case, the maximum confinement time of eight years four months was not

[Fn. continued.]

When a juvenile court sustains criminal violations resulting in an order of wardship and removes a minor from the custody of his parents, it must specify the maximum confinement term, which must not be longer than the maximum term of imprisonment an adult would receive for being convicted of the same offense or offenses. When computing the maximum confinement term, the court possesses discretion to aggregate terms on the basis of multiple counts or petitions. (*In re Adrian R.* (2000) 85 Cal.App.4th 448, 454.)

"[W]here the prior offenses are to be considered to aggregate the maximum term to extend it beyond that which could be imposed for the new offense, due process requires notice of the juvenile court's intention in order to provide the minor with a meaningful opportunity to rebut any derogatory material within its prior record. [Citations.]" (*In re Michael B.* (1980) 28 Cal.3d 548, 553 (*Michael B.*).) "When read together, sections 656, 656.1, 700, 702, 776 and 777 demonstrate a clear legislative intent to require advice to the minor of possible consequences, including the maximum period of physical confinement, at the detention or jurisdictional hearing, or at some point before an admission is accepted or a contested jurisdictional hearing commences. [Citations.]" (*In re Richard W.* (1979) 91 Cal.App.3d 960, 978, fn. omitted (*Richard W.*).) No particular form for the required notice is required. (*In re Steven O.* (1991) 229 Cal.App.3d 46, 56 (*Steven O.*).) Providing notice of intent to aggregate in the current petition satisfies this requirement. (*Ibid.*) If the petition does not contain notice of intent to aggregate, the appellant bears the burden of showing prejudice under the harmless beyond a reasonable doubt standard of review. (*Id.* at p. 57; *Michael B., supra*, 28 Cal.3d at p. 555; *Steven O., supra*, 229 Cal.App.3d at p. 57; *Richard W., supra*, 91 Cal.App.3d at p. 980.) If prejudice is shown, then the matter is remanded for redetermination of the

---

precluded by statute and the court did not violate mandatory provisions governing the legal period of confinement. Therefore, the sentence was not unauthorized.

maximum permissible term of confinement "'by means of procedures which give fair notice to the minor and an opportunity to be heard.' [Citations.]" (*Michael B., supra*, 28 Cal.3d at p. 555; *In re Edwardo L.* (1989) 216 Cal.App.3d 470, 476 (*Edwardo L.*).)

In *Steven O., supra*, 229 Cal.App.3d 46, this court held that even though the petition failed to provide the minor with notice of intent to aggregate, no prejudice resulted because of the following four reasons: (1) the minor denied the allegations contained in the petition and the matter proceeded to a contested jurisdictional hearing; (2) a written probation report expressly recommending aggregation was prepared prior to the disposition hearing; (3) at the detention hearing, neither the minor nor his counsel registered any objection to or surprise with the recommendation, implying they "knew and understood the court's power and intention to aggregate time"; and (4) the only argument they presented regarding disposition was that the minor should be committed to a local camp rather than to the Department of Juvenile Justice. (*Steven O., supra*, 229 Cal.App.3d at p. 57.)

Steven O. is directly on point. In this case, appellant denied the allegations contained in the current petition and a contested jurisdictional hearing occurred. A detention report was prepared 23 days before the jurisdictional hearing was held. It described the offenses contained in both the current and the prior petitions. A supplemental detention report was filed days before the disposition hearing. It set forth the maximum confinement time for each offense contained in the current and the prior petition and determined the maximum confinement time to be eight years four months. At the disposition hearing, the court stated that it was going to follow the recommendations contained in the dispositional report. Neither defense counsel nor appellant registered any surprise or objection to the eight-year four-month maximum confinement time. Defense counsel's sole objection was that he wanted the court to "impose a little bit less time than the 150 days and let him be on the electronic

monitoring a little bit longer with his father." Following and applying *Steven O.*, we conclude that the current petition's failure to contain express notice of intent to aggregate was harmless beyond a reasonable doubt.

In his reply brief, appellant argues *Steven O.* "is unsound authority" that cannot be reconciled with the holdings in *Michael B.* and *Edwardo L.* We are not persuaded. First, *Michael B.* specifically held that failure to provide notice of intent to aggregate is evaluated under the harmless beyond a reasonable doubt standard. (*Michael B., supra*, 28 Cal.3d at p. 555.) Second, appellant relies on a footnote in *Edwardo L.* stating that "due process mandates notice to the minor of the prior offenses to be relied upon at or before the jurisdictional hearing. Notice before or at the dispositional hearing is inadequate." (*Edwardo L., supra*, 216 Cal.App.3d at p. 476, fn. 4.) Appellant has taken this quote out of context. *Edwardo L.* did not conclude that failure to provide adequate notice of intent to aggregate is reversible per se or even address the question of prejudice because the petition at issue in *Edwardo L.* contained express notice of intent to aggregate. (*Id.* at p. 479.) Also, appellant had notice of the prior offenses to be relied on before the jurisdictional hearing was held. Notice was filed on the same date the current petition was filed notifying appellant that he was no longer eligible for deferred entry of judgment and the detention report, which was filed 23 days before the contested jurisdictional hearing was held, set forth the prior and the current offenses as well as specifically noting the deferred entry of judgment disposition in the prior case.

Accordingly, we conclude the current petition's failure to expressly provide notice of intent to aggregate is harmless beyond a reasonable doubt.

II. Appellant is entitled to 72 additional predisposition credits.

When a juvenile court elects to aggregate a minor's period of physical confinement on multiple petitions pursuant to section 726, it must also aggregate the predisposition custody credits attributable to those petitions. (*In re Eric J.* (1979) 25

Cal.3d 522, 533-536.) Error in calculation of custody credits may be raised for the first time on appeal. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 350.)

Here, the court awarded custody credits for time spent in predisposition custody for the current petition but it failed to award credits for the time spent in predisposition custody for the prior petition. Respondent properly concedes that appellant is entitled to 72 additional predisposition credits for the earlier period of predisposition confinement. Since there is sufficient information in the record to calculate the proper number of credits, this court can correct the error; remand is unnecessary. (See, e.g., *People v. Olmstead* (2000) 84 Cal.App.4th 270, 278-279.)

DISPOSITION

The judgment is modified to award appellant 72 additional days of predisposition custody credit. As modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended disposition order reflecting the additional custody credits and to transmit it to the appropriate authorities.

_____
Levy, Acting P.J.

WE CONCUR:

_____
Cornell, J.

_____
Hill, J.